Department of Veterans Affairs

Memorandum

Date: November 21, 2014

VAOPGCPREC 6-2014

From: Acting General Counsel (022)

Subj: Notice Required by 38 U.S.C. § 5103(a)(1) Upon Receipt of a New and Material Evidence Claim

To:

Under Secretary for Benefits (20)
Executive in Charge, Board of Veterans' Appeals (01)

QUESTION PRESENTED:

Whether, pursuant to 38 U.S.C. § 5103(a)(1), the Department of Veterans Affairs (VA) is required upon receipt of a claim to reopen based upon new and material evidence to provide notice of the information and evidence necessary to substantiate the particular factual element or elements that were found insufficient in the previous denial of the claim.

RESPONSE:

Pursuant to 38 U.S.C. § 5103(a)(1), upon receipt of a claim to reopen a previously denied claim, VA is not required to provide notice of the information and evidence necessary to substantiate the particular factual element or elements that were found insufficient in the previous denial of the claim.

COMMENTS:

1. Long before Congress enacted 38 U.S.C. § 5103(a), it was well established that, "[i]f new and material evidence is presented or secured with respect to a claim which has been disallowed, the Secretary shall reopen the claim and review the former disposition of the claim." 38 U.S.C. § 5108; *see* Veterans Regulation No. 2(d), Instruction No. 3 (Oct. 18, 1935). Currently, upon receipt of a claim to reopen, VA notifies the claimant that new and material evidence must be submitted and defines the terms "new" and "material" evidence consistent with 38 C.F.R. § 3.156(a). VA's notice also states that the Department will make reasonable efforts to obtain "currently existing evidence" but will not provide a medical examination until the claim is successfully reopened. The question presented is whether, pursuant to 38 U.S.C. § 5103(a)(1), VA must provide notice regarding what evidence is necessary to substantiate the particular factual element or elements that were found insufficient in the previous denial of the claim – *i.e.*, case-specific notice – rather than the type of generic notice described above explaining the type of evidence generally needed to reopen a claim.

2. In construing a statute, we begin by "examining the language to determine the plain meaning of the words used by Congress." *Bazalo v. West*, 150 F.3d 1380, 1382

(Fed. Cir. 1998). Section 5103(a)(1) provides:

> The Secretary shall provide to the claimant and the claimant's representative, if any, by the most effective means available, including electronic communication or notification in writing, notice of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim. As part of that notice, the Secretary shall indicate which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, the Secretary, in accordance with section 5103A of this title and any other applicable provisions of law, will attempt to obtain on behalf of the claimant.

The statute requires VA to provide notification of "information[] and . . . evidence[ ] not previously provided . . . that is necessary to substantiate the claim." 38 U.S.C. § 5103(a)(1). Nothing in the plain language of section 5103(a)(1) requires VA to analyze the evidence provided for a previously finally decided claim and inform a claimant of its inadequacy.

3. The legislative history of 38 U.S.C. § 5103(a)(1) clearly shows that the information and evidence "necessary to substantiate the claim" relates to that affirmative information and evidence that supports or gives form and substance to a claim, not missing information and evidence that is necessary to prove a claim that has previously been denied. In describing the compromise agreement that became the public law that enacted section 5103, Congress explained:

> It is the Committees' intent that the verb "to substantiate," as used in this subsection and throughout the compromise bill (cf., proposed 5103A(a), 5103A(2), 5103A(g)) be construed to mean "tending to prove" or "to support." Information or evidence necessary to substantiate a claim need not necessarily prove a claim--although it eventually may do so when a decision on a claim is made--but it needs to support a clairn or give form and substance to a claim.

Explanatory Statement on H.R. 4864, As Amended, 146 Cong. Rec. 22,887 (2000). Clearly, Congress did not intend section 5103(a) to require VA to analyze the evidence gathered and inform the appellant of its inadequacy, or to inform the claimant of information that necessarily would result in a grant of the benefit sought. With respect to the nature of the "information . . . and . . . evidence" necessary to substantiate the claim, Congress explained that it referred to "the types of evidence that could be useful to the Secretary in deciding the claim." *Id.*

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4. In 2012, Congress revised 38 U.S.C. § 5103(a) by removing language requiring that notice required by that statute be provided "[u]pon receipt of a complete or substantially complete application." Pub. L. No. 112-154, § 504(a), 126 Stat. 1165, 1191 (2012). The legislative history of that statute explained that this change "would remove the requirement that the . . . notice be sent only after receipt of a claim, thereby allowing VA to put notice on claims application forms." Joint Explanatory Statement for Certain Provisions Contained in the Amendment to H.R. 1627, as Amended, 158 Cong. Rec. S5,162 (Jul. 18, 2012). In authorizing VA to provide the notice required by 38 U.S.C. § 5103(a)(1) on standard application forms, Congress plainly indicated its understanding that the statute allows VA to provide generic notice of the information and evidence generally necessary to substantiate a particular type of claim and does not require VA to provide notice tailored to the circumstances of a particular individual's claim.

5. We recognize that 38 U.S.C. § 5103(a)(1) requires VA to provide notice of the information and evidence "not previously provided to the Secretary that is necessary to substantiate the claim." However, the Federal Circuit has held that this language is not "intended to require an analysis of the individual claim in each case," but only to require notice of "the information and evidence necessary to substantiate the particular type of claim being asserted." *Wilson v. Mansfield*, 506 F.3d 1055, 1059 (Fed. Cir. 2007). In claims to reopen, this requires VA "to explain what 'new and material evidence' means." *Akers v. Shinseki*, 673 F.3d 1352, 1358 (Fed. Cir. 2012). This information notifies the claimant of the types of evidence not previously provided to VA that may substantiate the claim. Pursuant to Public Law 110-389, VA Form 21-526EZ, Application for Disability Compensation and Related Compensation Benefits, provides notice that, in order to reopen a previously denied claim, VA "need[s] new and material evidence," *i.e.*, the "evidence must raise a reasonable possibility of substantiating your claim." 38 U.S.C. § 5108; 38 C.F.R. § 3.156(a). The notice also explains the meaning of the terms "new" and "material" evidence. The prior final decision denying the claim will have included a written statement of the reasons for the denial and of the evidence considered, and VA's notice explaining the "new and material evidence" requirement provides notice of the information and evidence "not previously provided to the Secretary that is necessary to substantiate the claim." *See* 38 U.S.C. §§ 5104(b) and 7105(d)(1); *Hartman v. Nicholson*, 483 F.3d 1311, 1314-15 (Fed. Cir. 2007) (rejecting contention that VA must provide notice under section 5103(a)(1) upon receipt of a notice of disagreement with a decision by an agency of original jurisdiction).

6. When VA promulgated 38 C.F.R. § 3.159(b) to implement section 5103(a)(1), the Department rejected comments that the regulation "should state in more specific detail what will be required to be contained in every notice to the claimant on what is needed to establish entitlement for an individual claim." 66 Fed. Reg. 45,620, 45,622 (2001). In rejecting these comments, VA explained that "[t]he statutory notice required by [38 U.S.C. § 5103(a)(1)] occurs at an early point in the claims process when . . . VA does

not yet know what kinds of specific evidence to try to obtain on behalf of the claimant." *Id.* VA also rejected a suggestion that the regulation provide that, "if VA receives evidence that is inadequate to substantiate the claim, VA should contact the claimant and give him or her the opportunity to correct the inadequacy or bolster the evidence." 66 Fed. Reg. at 45,623. The United States Court of Appeals for the Federal Circuit concurred in VA's approach in a general challenge to the implementing regulations. In *Paralyzed Veterans of Am. v. Secretary of Veterans Affairs*, 345 F.3d 1334, 1347-48 (Fed. Cir. 2003), the court rejected an argument that the regulation was invalid because it does not identify with specificity the evidence necessary to substantiate the claim. The court stated that "the regulation is clearly consistent with the statute, and its requirements are both reasonable and sufficient." 345 F.3d at 1348.

7. The case law of the United States Court of Appeals for the Federal Circuit in veteran-specific appeals also supports the conclusion that 38 U.S.C. § 5103(a)(1) and 38 C.F.R. § 3.159(b)(1) do not require notice of the information and evidence necessary to cure deficiencies in a previously denied claim. In *Wilson*, 506 F.3d at 1060, the Federal Circuit held that 38 U.S.C. § 5103(a)(1) and 38 C.F.R. § 3.159(b)(1) are satisfied by generic notice. The court stated that VA has interpreted 38 U.S.C. § 5103(a) "to require only a generic notice after the initial claim for benefits has been filed" and held that this is a "reasonable interpretation" of the statute to which a court must defer. 506 F.3d at 1060. The court also found that 38 C.F.R. § 3.159(b)(1), which interprets 38 U.S.C. § 5103(a)(1) to require generic rather than case-specific notice, is consistent with the statute. 506 F.3d at 1059-60. Two years later in *Vazquez-Flores v. Shinseki*, 580 F.3d 1270, 1277 (Fed. Cir. 2009) ("*Vazquez-Flores II*"), the Federal Circuit stated that "*Wilson* and *Paralyzed Veterans* put to rest the notion that the VA is required to provide veteran-specific notice, although *Wilson* requires the notice to be claim-specific." The court rejected the argument that, under section 5103(a)(1), VA is required to provide a veteran seeking an increased rating with the relevant rating criteria under every diagnostic code potentially applicable to the veteran's current disability, although VA must provide generic notice regarding the particular type of claim, *i.e.*, a claim for an increased rating. 580 F.3d at 1277-78.

8. We recognize that, in *Kent v. Nicholson*, 20 Vet. App. 1, 9-10 (2006), the United States Court of Appeals for Veterans Claims (Veterans Court) held that, upon receipt of a claim to reopen, VA must "look at the bases for the denial in the prior decision and . . . [provide] a notice letter that describes what evidence would be necessary to substantiate th[e] element or elements . . . that were found insufficient in the previous denial." This holding in *Kent*, which required VA to provide case-specific notice upon receipt of a claim to reopen, is inconsistent with the subsequent Federal Circuit decisions in *Vazquez-Flores* and *Wilson*, holding that section 5103(a)(1) is satisfied by "generic notice," *i.e.*, notice that "identif[ies] the information and evidence necessary to substantiate the particular type of claim being asserted" by a claimant and rejecting the argument that the statute requires specific notice of missing evidence with respect to a

particular claim. 580 F.3d at 1277; 506 F.3d at 1059. Further, subsequent to *Kent*, Congress revised 38 U.S.C. § 5103(a) in Public Law 112-154 to authorize VA to provide notice under that section before VA receives the claim, such as by including the notice on standard application forms. Under the Federal Circuit's precedents and the revision made by Public Law 112-154, 38 U.S.C. § 5103(a)(1) cannot be construed to require notice tailored to the facts or circumstances of an individual claim. *Kent*, therefore, is no longer controlling insofar as it construed former 38 U.S.C. § 5103(a) to require that VA provide such case-specific notice to a claimant who has filed an application to reopen a previously denied claim.

9. We also note that the Veterans' Benefits Improvement Act of 2008, Pub. L. No. 110-389, § 101(a)(2), 122 Stat. 4145, 4147 (codified at 38 U.S.C. § 5103(a)(2)), requires the Secretary of Veterans Affairs to prescribe in regulations requirements relating to the content of notice to be provided under 38 U.S.C. § 5103(a). Section 5103(a)(2)(B) of title 38, United States Code, states that VA's regulations must specify "different contents" for notice based on the type of claim filed (*e.g.*, original claims, claims for reopening, claims for increase), must provide that the contents of the notice be appropriate to the type of benefits or services sought under the claim, and must specify the "general information and evidence required to substantiate the basic elements" of each type of claim. The statute, however, does not specify the types of "information and evidence" that would be required for any type of claim, nor does it limit VA's authority to determine what types of information and evidence are necessary for that purpose. We recognize that the Senate Committee on Veterans' Affairs report on Pub. L. No. 110-389 urged VA to codify in regulations the Veterans Court's holding in *Vazquez-Flores v. Peake*, 22 Vet. App. 37 (2008) ("*Vazquez-Flores I*"), that 38 U.S.C. § 5103(a)(1) requires VA to provide case-specific notice in increased-rating claims regarding the relevant diagnostic code criteria applicable to a claim. S. Rep. No. 110-449, at 11-12 (2008). However, as explained above, in *Vazquez-Flores II*, which was decided after enactment of Pub. L. No. 110-389, the Federal Circuit held that the Veterans Court's interpretation of section 5103(a)(1) is inconsistent with *Paralyzed Veterans* and *Wilson*. 580 F.3d at 1277-78. In addition, the views expressed in the Committee report do not carry the force of law, particularly where they do not illuminate the meaning of the statutory terms, but merely express expectations that were not themselves reflected in the statute as passed. *See Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) ("Congress may always circumscribe agency discretion . . . by putting restrictions in the operative statutes (though not . . . just in the legislative history)"); *Strickland v. Commissioner, Maine Dep't of Human Servs.*, 48 F.3d 12, 19 (1st Cir. 1995). The fact that Public Law 110-389 itself contains no language requiring VA to adopt case-specific notice requirements thus supports the conclusion that the "expectation" expressed in the Senate Committee report is not dispositive as to the notice that VA must provide upon receipt of a claim for an increased rating. Finally, as discussed above, the subsequent 2012 revision of 38 U.S.C. § 5103(a) made by Public Law 112-154 further clarified that current section 5103(a)(1) may be satisfied by generic notice that is

provided to claimants, through means such as standard forms, before VA receives the claimants' claims. The legislative history of the 2008 Act cannot be construed to override the clear language and purpose of the 2012 revision of the statute.

10. We note as well that providing case-specific notice to some claimants (*i.e.*, those who seek to reopen claims) but not to others would be unfair or would at least create an appearance of unfairness. Also, we see no need to provide case-specific notice upon receipt of a claim to reopen because in comparison to a claimant filing an original claim, a claimant who seeks to reopen a previously denied claim will have already received case-specific information when the claim was previously denied and is thus likely to have a better understanding of what information and evidence is needed.

11. In conclusion, neither the plain language of 38 U.S.C. § 5103(a)(1) nor its legislative history require that, upon receipt of a claim to reopen, VA must provide notice of the information and evidence necessary to substantiate the element or elements that were found insufficient in the previous denial of the claim. The type of notice required by *Kent* is case-specific rather than generic notice because, in order to comply with the decision, VA would have to review each claim file to determine the bases upon which the previous claim(s) were denied. As explained above, VA has instead consistently interpreted the statute as requiring "generic" rather than case-specific notice and the Federal Circuit has repeatedly held, including in two cases subsequent to *Kent*, that VA's interpretation is a "reasonable interpretation" to which a court must defer. *Wilson*, 506 F.3d at 1059-60; *Vazquez-Flores*, 580 F.3d at 1280-81.

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